In the Supreme Court

OF THE

United States

Supreme Court, U. S.
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OCTOBER TERM, 1940

No. 531

JOHN DEMARTINI CO., INC. (a corporation), EDWARD L. KAHN, doing business under the name and style of Edw. L. Kahn & Co., and P. LERNER COMPANY, LTD. (a corporation),

Petitioners,

vs.

THE AMERICAN STEAMER MAUI, her engines, boilers, tackle, apparel, and furniture, and MATSON NAVIGATION COMPANY (a corporation),

Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit,
and
BRIEF IN SUPPORT THEREOF.

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No.

JOHN DEMARTINI CO., INC. (a corporation), EDWARD L. KAHN, doing business under the name and style of Edw. L. Kahn & Co., and P. LERNER COMPANY, LTD. (a corporation),

Petitioners,

vs.

THE AMERICAN STEAMER MAUI, her engines, boilers, tackle, apparel, and furniture, and MATSON NAVIGATION COMPANY (a corporation),

Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petition of John Demartini Co. Inc., a corporation, Edward L. Kahn, an individual doing business under the

name and style of Edw. L. Kahn & Co., and P. Lerner Company, Ltd., a corporation, for a writ of certiorari to review a decree of the United States Circuit Court of Appeals for the Ninth Circuit sitting in admiralty respectfully shows to this Honorable Court:

A.

STATEMENT OF MATTER INVOLVED.

Petitioners filed libels in admiralty against respondent to recover for damages to shipments of cargo while in its custody as a common carrier by water (R. 3).

On October 26 and 27, 1936, petitioners shipped on board respondent's steamer MAUI, a common carrier, at San Francisco, California, a large quantity of perishable cargo, consisting of fresh fruits and vegetables, in good order and condition for transportation to ports in the Hawaiian Islands (R. 67).

The vessel was scheduled to sail from San Francisco at noon on October 27th, on her voyage which would ordinarily take seven days (R. 67, 210). On that date, at about 3 P. M., the ship left her dock with petitioners' cargo aboard and proceeded out into San Francisco Bay, where she anchored (R. 215, 243). The vessel remained at such anchorage from October 27, 1936, to February 5, 1937 (R. 67).

During such interval of time, petitioners' cargo by reason of its inherent nature deteriorated. Part of the cargo was dumped during the time the ship lay at anchor and the remainder was discharged from the vessel when she returned to her dock on February 5, 1937 (R. 67).

The unlicensed deck crew of the MAUI, consisting of 12 seamen, had left her a few hours before she sailed from

her dock (R. 212, 253). Her unlicensed engine-room crew, consisting of 21 men, left the vessel after her lines were cast off (R. 225, 243, 343). The vessel's required crew consisted of 53 men, including officers (R. 212). She was, therefore, short 33 men as she proceeded out from her dock to anchorage.

The vessel was dispatched from her dock by respondent's operating manager for the two-fold purpose of loading a cargo of dynamite at the explosives anchorage in the bay and to facilitate securing a crew (R. 351). There was testimony that if the ship were out in the bay, the crew could not leave so readily—a mild form of shanghaiing (R. 153-154).

After midnight on the morning of October 30, 1936, a strike of maritime labor occurred which lasted until February 5, 1937 (R. 193-194).

Petitioners pleaded the failure of respondents to perform the contract of carriage. They also alleged that the ship, after being loaded, commenced her voyage but later anchored in the bay, whereupon petitioners made unavailable demands for the discharge of their goods when informed that the vessel could not proceed on her voyage (R. 3).

Respondent, in its answer, admitted the failure to carry the cargo to destination, the damage to the cargo and the failure to discharge the cargo as demanded, but set up as defenses that the damage was due to the inherent nature of the goods and to delay and detention caused by strikes and labor troubles, causes for which respondent claimed exemption under the provisions of the bills of lading (R. 16, 483).

As stated in the Court's opinion, *Respondent introduced no evidence whatever, and there is no evidence in the record, to show that the MAUI was in any respect seaworthy when she received petitioners' cargo, or when she left her dock, or at any time here involved, or that due diligence to that end had ever been exercised* (R. 486).

The District Court wrote no opinion but made findings that the damage was due to the inherent nature of the goods becoming operative during the delay and detention caused by strikes and labor troubles, causes from which respondent was exempt from liability under its bills of lading (Finding XI, XIII and XVII, R. 432). The District Court thereupon entered a decree dismissing the libels (R. 447).

The Circuit Court of Appeals affirmed the decree and findings of the District Court (R. 482). In its opinion the Circuit Court of Appeals specifically ruled that respondent did not have to prove that its vessel was seaworthy or that due diligence to make her so had been exercised in order to rely upon its bill of lading exemptions from liability (R. 486). The Court further ruled that the vessel was not unseaworthy by reason of her lack of a full crew when she proceeded from her dock to the powder anchorage in the bay (R. 488).

The Circuit Court of Appeals states in its opinion that "The general maritime strike commencing in October, 1936, and raging for more than three months thereafter, provides the background of the litigation" (R. 483). The Court, therefore, apparently believed that such condition in some way lessened the obligations of a common carrier by water to carry safely and care for the cargo of ship-

pers established by a host of decisions by this Court and other Circuit Courts of Appeal. Are the legal rights of petitioners, who are shippers of cargo, any the less because the carrier who has custody of their goods becomes engaged in strife with its employees? A carrier who relies on a bill of lading exception against "strikes" is neither legally nor morally entitled to greater consideration than a carrier who relies on an exception against "perils of the sea". A carrier may, and frequently does, contribute to the onset of a strike, but even a strike-provoking carrier does not create a peril of the sea.

B.

JURISDICTION OF THIS COURT.

1. Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stats. 938, 28 U. S. Code, Section 347(a) to review a decree of the United States Circuit Court of Appeals for the Ninth Circuit.

2. The decree which petitioners seek to have this Court review was dated and entered August 2, 1940 (R. 489). A petition for rehearing was thereafter duly filed and said petition for rehearing was denied by order dated and entered on September 20, 1940 (R. 490).

3. This is a suit in admiralty for breach of a contract of affreightment commenced in the United States District Court for the Northern District of California (R. 3, 428). The District Court had original jurisdiction of such cause pursuant to the United States Constitution, Article

III, Section 2(1) and by virtue of Section 24(3) of the Judicial Code (U. S. Code, Title 28, Section 41(3).

Morewood v. Enequist, 64 U. S. 491, 16 L. Ed. 516;
Krauss Bros. Lumber Co. v. Dimon S. S. Corp., 290 U. S. 117, 122, 78 L. Ed. 216, 219.

4. An appeal was taken to the United States Circuit Court of Appeals for the Ninth Circuit pursuant to Section 128(a), First, of the Judicial Code, amended, U. S. Code, Title 28, Section 225(a), First.

C.

QUESTIONS PRESENTED.

1. Can a common carrier by water who is subject to the provisions of the Harter Act* rely upon exceptions in its bill of lading to exempt itself from prima facie liability for damage to cargo without first proving that it had exercised due diligence to make its vessel in all respects seaworthy, or if such diligence was not exercised, that unseaworthiness did not contribute to the damage?

2. Can a common carrier by water, who is subject to the provisions of the Harter Act, rely upon an unconditional exception in its bill of lading, without proof of the exercise of due diligence to make its vessel in all respects seaworthy, to exempt itself from liability for a cause of damage to cargo for which exemption is granted under the third section of the Harter Act only upon the express condition that it shall have exercised due diligence to make its vessel in all respects seaworthy? In other words,

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*Printed in full on pages i-ii of the appendix hereto.

can a carrier avoid the condition of an exemption provided for by the Harter Act by inserting an unconditional exemption against the same cause of damage in its bill of lading?

3. Is a vessel which is navigated without a full crew, contrary to the provisions of a statute* of the United States (46 U. S. Code, Section 222, Revised Statutes, Sections 4463, as amended by Act of May 11, 1918, Chapter 72, Section 1, 40 Stat. 548) unseaworthy?

(a) Can a shipowner who navigates his vessel in violation of said statute escape liability for damage to cargo carried on such vessel without proof that such statutory violation could not have contributed to the damage?

D.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The decision of the Circuit Court of Appeals that a common carrier may rely upon bill of lading exceptions to exempt it from liability for damage to cargo without first proving the exercise of due diligence to make its vessel in all respects seaworthy is in direct conflict with the following decisions in which such proof was held to be essential:

(a) *Decisions of this Court:*

Martin v. The Southwark, 191 U.S. 1, 12, 48 L. Ed. 65, 71;

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*Printed in full on page 33 of the annexed Brief.

Bradley Fertilizer Co. v. The Edwin I. Morrison, 153 U.S. 199, 211, 38 L. Ed. 688, 692.

(b) *Decisions by other Circuit Courts of Appeals:*

The Benjamin Noble, 244 Fed. 95, 98 (6 C.C.A.);

The Skipsea, 9 Fed. (2d) 887, 888 (2 C.C.A.);

The Thomas P. Beal, 11 Fed. (2d) 49, 51 (3 C.C.A.);

Atlantic Gulf & West Indies S. S. Line v. Interocean Oil Co., 31 Fed. (2d) 1006 (4 C.C.A.).

(c) *Decisions by District Courts:*

Kaufer v. Luckenbach S. S. Co., 284 Fed. 160, 161 and 294 Fed. 978, 981 (W.D. Wash.);

Cafiero & Mencacci v. Navigazione Libera Triestina, 50 Fed. (2d) 199, 202 (E.D.N.Y.);

American Co. v. U. S., 26 Fed. (2d) 468, 469 (S.D.N.Y.);

The Benjamin Noble, 232 Fed. 382, 389 (E.D. Mich.);

The Cornelia, 15 Fed. (2d) 245, 247 (S.D.N.Y.);

The Agwimoon, 24 Fed. (2d) 864, 867 (D.C. Md.);

The Poznan, 276 Fed. 418, 431 (S.D.N.Y.);

The Kensington, 88 Fed. 331, 333 (S.D.N.Y.).

2. The decision of the Circuit Court of Appeals that a common carrier may, without proof of due diligence to make its vessel in all respects seaworthy, rely upon an unconditional exception in its bill of lading to exempt itself from liability for a cause of damage for which exemption is granted under the third section of the Harter Act only upon the express condition that such proof of due diligence be affirmatively shown, is in direct conflict with the decision of this Honorable Court in *Martin v. The Southwark,* 191 U.S. 1, 48 L. Ed. 65.

3. The decision of the Circuit Court of Appeals that a vessel which is navigated without her full required complement of crew contrary to a statute of the United States is not unseaworthy and that the carrier is not liable for damage to cargo although it failed to prove that such statutory violation could not have contributed to the damage is in conflict with the following decisions of this Honorable Court and the decisions of other Circuit Courts of Appeal:

(a) *Decisions of this Court:*

Richelieu & Ontario Nav. Co. v. Boston Marine Ins. Co., 136 U.S. 408, 422, 34 L. Ed. 398, 403;

Lie v. San Francisco & P. S. Co., 243 U.S. 291, 298, 61 L. Ed. 726, 733.

(b) *Decisions by Circuit Courts of Appeal:*

The New York Marine No. 10, 109 Fed. (2d) 564, 566 (2 C.C.A.);

The Denali, 105 Fed. (2d) 413, 418, 420, on rehearing, 112 Fed. (2d) 952, 954 (9 C.C.A.).

4. The decision of the Circuit Court of Appeals places a burden of proof upon the cargo owner to prove facts which are within the knowledge of the carrier but which are not within the knowledge of the cargo owner, contrary to the decision of this Honorable Court in *Schnell v. The Vallescura,* 293 U.S. 296, 304, 79 L. Ed. 373, 377.

5. The decision in this case as to burden of proof is not one applicable merely to a particular contract or to the circumstance of this case alone. The same questions, as to the carrier's burden of proof, will arise in countless cases where transportation is governed by the Harter Act. It is essential, as frequently recognized by this Court,

that there be a uniformity of decision in Courts of Admiralty.

Chelentis v. Luckenbach S. S. Co., 247 U.S. 372, 382, 62 L. Ed. 1171, 1176;

May v. Hamburg-American Line, 290 U.S. 333, 352, 78 L. Ed. 348, 356.

Wherefore, your petitioners respectfully pray that a writ of certiorari issue to the United States Circuit Court of Appeals commanding that Court to certify and send to this Court for its review and determination a full and complete transcript of the record and proceedings in the above-entitled cause, and that said decree may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as may seem meet and just.

Dated, San Francisco, California,
October 23, 1940.

JOHN DEMARTINI CO., INC.
(a corporation),
EDWARD L. KAHN, doing business under the name and style of Edw. L. Kahn & Co.,
P. LERNER COMPANY, LTD.
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